Supreme Court of the United States.

MARGARET HETZEL, *Plaintiff in Error*,
vs.
THE BALTIMORE & OHIO R. R. Co. } No. 110.
Oct. Term, 1897.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT.

Before 1870, the plaintiff and Andrew Wylie owned in common a large and valuable lot in square 630 in the City of Washington. It comprised all of lot 1 except the northeast corner, which was owned by Judge Wylie in severalty. In December, 1871, in order to make their property available for sale in the shape of building lots, Mrs. Hetzel and Judge Wylie entered into a deed of partition. They had a plan recorded January, 1872, in the office of the surveyor of the District of Columbia, a copy of which is printed at page 10, of the record.

The lot they subdivided into lots, most of them fronting on North Capitol Street. They created an alley system, with an alley ten feet in width leading north from D Street, and communicating with the rear of all the lots. The only way of access to the rear of lot, it will be seen, was from D Street.

This subdivision was effected under the provisions of Chap. 16 of the *Revised Statutes of the District of Columbia*, section 477 of which reads as follows:

> "Whenever the proprietor of any square or lot shall deem it necessary to subdivide the same into convenient building lots or portions for sale and occupancy and alleys for their accommodation, he may cause a plat to be made on which shall be expressed the dimensions and length of all the lines of such portions as are necessary for defining and laying off the same on the ground, and may certify such subdivision under his hand and seal, in the presence of two or more credible witnesses, upon the same plat, or on a paper or parchment attached thereto.

Sec. 480 provides that,

> "The ways, alleys or passages, laid out or expressed on any plat of subdivision, shall be and remain to the public, or subject to the uses declared by the person making such subdivision, at all times under the same police regulations as the alleys laid off by the commissioners on division with the original proprietors."

Upon the plat so recorded were these words:

"This is to certify that we have subdivided that part of lot 1, in square 630, owned jointly by us, into the lots as laid down in the above plats as lots 1–11, both inclusive, with the alleys for their accommodation, which alleys are exclusively for the sole benefit and use of said lots. (Rec. 8.)

The deed of partition provided that the owner or owners of lots 8, 9 and 11, and of the Wylie lot at the northeast corner, might at any time in their discretion close the 10-foot alley running northwest from the main area in the rear of lots 8 and 9. Also, that the owner or owners of lots 4 and 5 shall have like privilege to close the 5-foot alley. Also, that all these alleys and area shall be *private*, and to be under the control of all owners of property touching thereon, and except as hereinbefore otherwise provided shall never be closed *unless by common consent.* (Rec. 9–10.)

The plaintiff, under this partition, became owner of lots 1–5, while Judge Wylie owned lots 6–11.

In January, 1872, plaintiff, in order to deal with the property as a whole, bought out Judge Wylie, and became owner of *all* of lot 1 in square 630. She could, thereafter, close the alleys if she saw fit, and hold the property as one undivided lot, or she could make a new subdivision.

The lot in question was well suited to building purposes as a city lot. Mrs. Hetzel tried to sell it. She put it in the hands of agents who were active in their endeavors to dispose of it. During the whole of the period covered by the present suit she made every possible effort to sell it, and instructed real estate agents to sell or get an offer for purchase. She gave them the whole lot to sell but did not forbid them to sell any part. Her instructions were to make some disposition of it, so that it could be utilized in some way; to sell it in whole, or in part, or in any way. "I always told them I wanted to

sell or lease the whole or any part of it, in order to get buildings put up on the front of it (Rec. 7, 8).

From January, 1870, the owner had not used the land and *could not use* it, because it was impossible to get upon it (Rec. 7). She had tried to sell it with no success, parties saying that the position of the railroad rendered it useless to them. There was no access to the land from D street except on foot, and even this was cut off by a wall of freight cars (*Ibid*). The railroad company was maintaining a siding in D street, all along the plaintiff's premises, about where the sidewalks would be (*Ibid*). They occupied D street as a freight yard. A line of cars continuously stood on the track, and carts were backed up against the cars for the reception and delivery of freight. This was not a temporary obstruction, but one that had every appearance of being permanent. It was continuous during the entire period covered by this suit, 1873–1876 (*Ibid*).

All access to the plaintiff's premises by way of D street was destroyed. It was impossible to get upon the land from D street, and it was as if a solid wall had barred the owner and everybody else out. This wrong inflicted upon the plaintiff was the more flagrant since North Capitol street then, as now, remained ungraded because of the defendant's tracks, so that there was no approach from the south, by way of North Capitol street.

Plaintiff brought suit against the railroad company in April, 1873, for the obstruction of D street, as well as for maintaining illegally their tracks across North Capitol street, thereby preventing the grading of that street, and injuring her property. By consent the cause went to a referee. He found that the track on D street was illegal, and those on North Capitol street legal. He reported in favor of the plaintiff, assessing

the damages at $843.86. The referee applied as the rule of damages, interest during the continuance of the damage on the difference between the present value of the land and what would be its value if the damaging cause were removed. As he found the lot contained 32,331 square feet, and its value was 67 cents a foot with the track there, and $1.00 with the track removed, the referee awarded interest on the difference, viz., $10,669.23 from January, 1872, to date of writ. (Record of No. 83, October Term, 1879, Supreme Court of United States.)

Both parties excepted to his report; judgment was entered upon the report, and both parties appealed to the General Term. After keeping the cause for nearly two years under advisement, the General Term affirmed the judgment below. No opinion was reported.

The plaintiff brought the case to this court upon a writ of error, the record will be found in No. 83, October Term, 1879, where the report of the referee is printed in full. The plaintiff assigned as error that the referee (1) had not awarded damages from 1st January, 1870, but only from 1 January, 1872. (2) Had found the location of the North Capitol street tracks legal. (3) Had erred in laying down the rule of damages.

This Court, 15 December, 1879, affirmed by a divided Court the judgment of the Court below. There was no opinion filed.

The parties had supposed that the law of the case would be speedily settled in the first suit.

Meanwhile, to save the statute of limitations, plaintiff had brought her second suit in 1876—the present case, in which this appeal is taken. This suit did not come to trial while the previous action was pending. Later, owing to the crowded state of the docket, and the fact that Mr. Cox, who had been

counsel for the defendant, had taken his seat on the bench, and could not hear the case when reached, a trial was not had till 1884, when a verdict was rendered for $4,382.10 with interest from 24 April, 1876. This judgment was reversed in General Term, on the ground that the Court below had mistaken the rule of damages.

A second trial in 1886 resulted in a verdict for $3,750, without interest. Judgment on this verdict was set aside and a new trial ordered because the Court said (JAMES, J.) that although the rule of damages laid down in the former opinion had been followed, yet there were qualifications that ought to have accompanied the instructions. 6 Mackey, 1.

Subsequently the plaintiff amended her declaration, striking out the count in respect to North Capitol street and adding the words "and prevented the plaintiff from selling the same though she tried so to do (Rec. 7). The defendants pleaded (1) not guilty, (2) Statute of Limitations, (3) Former recovery (Rec. 5).

The cause came on to be tried October, 1894, before Chief Justice BINGHAM and a jury.

The plaintiff's testimony tended to establish in proof the facts already stated as to the continued maintenance of the track and freight cars on D street so as to destroy access to her land. She testified that she made every possible effort to sell the property, to sell it or to lease it, or in any way to get people to build upon it. "Of course, I gave them [real estate agents] the whole lot to sell, but I did not forbid them to sell any part, and my instructions were to make *some disposition* of it, so that it could be *utilized in some way;* to lease it, or to sell it, in whole or in part, or *in any way* (Rec. 7).

Real estate agents testified that they had the land throughout the period covered by the suit; they took persons there

to buy, who objected to buying because of the D street track. They further testified that they could readily have sold the lot had it not been for the obstruction of the track for a certain price per foot. Experts testified to the value of the land with the track there, and with the track removed. (Rec. 8.)

Two witnesses, authorized to sell the property, said in effect that their instructions were to sell lot 1 as an entirety, and that they were not permitted to sell in parcels (Rec. 8). No other agent of the plaintiff or witness in the case testified as to instructions of plaintiff on that point.

The defendant offered in evidence the deeds of plaintiff and Judge Wylie to show the state of the title; also testimony tending to prove that since 1872 the property had been assessed for taxation and taxes paid upon it as subdivided into lots from one to eleven. (Rec. 8–10.)

The Court instructed the jury that the testimony showed that the plaintiff offered her property for sale as a whole and undertook to sell it as lot one; that the action was for damages for her not being able to sell lot one; that the testimony showed that even if she had received an offer for lot one she could not consummate the sale because she did not own the fee in the alleys. To this instruction the plaintiff excepted. The Court instructed the jury to find for plaintiff for one cent damages (and plaintiff excepted), which was done. (Rec. 12.)

A motion for a new trial upon a bill of exceptions was overruled. The Court of Appeals on an appeal from the order overruling the motion for new trial, and from the order of judgment on the verdict, affirmed the judgment, whereupon the plaintiff sued out a writ of error to this Court.

The Questions Involved.

I. The right of defendants to question the title of plaintiff to the premises under their plea of "not guilty."

This is brought up by the ruling of the trial judge that the plaintiff did not own the fee in the alleys. (Rec. 12.)

II. The right of the trial judge to instruct the jury that "the testimony showed that the plaintiff offered her property for sale as a whole, and undertook to sell it as lot one."

Plaintiff herself testified that she did not "forbid them to sell any part;" and that she told them to "sell in whole or in part."

This was for the jury to determine and the court had no right to assume that the fact was as the court states it; nor could the court properly instruct the jury (as it did) that "the testimony showed that even if she had received an offer for lot one she could not consummate the sale because she did not own the fee in the allays." (Rec. 12.)

III. The refusal by the trial judge to instruct the jury that if they found that the railroad company maintained the track on D street and used it so as to prevent access to and from her lot, and that such maintenance and use prevented the plaintiff from advantageously using, selling or renting her lot, then that plaintiff was entitled to such damages as would reasonably compensate her for the loss or injury so resulting. (Rec. 11.)

The instruction is printed below, marked 1.

IV. The refusal by the trial judge to instruct the jury as to the rule of damages. The instruction suggesting an "allowable method" of estimating damages is printed below, marked 2.

V. The refusal by the trial judge to give any instruction as to interest. The instruction prayed for is printed below, marked 3.

VI. Refusal by the trial judge to let the jury take the case

with the alley spaces excluded from their consideration of the extent of the damage. This instruction is printed below, marked 4.

VII. Refusal by the trial judge to instruct the jury that they could allow such damages as they should find resulted from the act of the defendant irrespective of any attempt by plaintiff to sell her property. This instruction is printed below, marked 5.

Specification of Errors.

I.

The Court of Appeals erred in affirming the judgment of the court below.

II.

It erred in deciding that each of the following five instructions was properly refused by the trial court; and in sustaining the ruling of the trial court specified in the sixth paragraph below which, in fuller form, is as follows:

"The testimony shows that the plaintiff offered her property for sale as a whole, and undertook to sell it as lot one; the action is for damages for her not being able to sell lot one; the testimony shows that even if she had received an offer for lot one, she could not consummate the sale, because she did not own the fee in the alleys. This being so, and the defendants' counsel conceding that the structure is illegal, the jury will find for the plaintiff for one cent damages." (Rec. 12.)

1. If the jury find from the evidence that the plaintiff from the 24th April, 1873, to 24th April, 1876, owned lot 1 in square 630, in the City of Washington, and that during that

entire period the defendant company maintained on D street between North Capitol street and New Jersey avenue a railway track over and along the bed of said street parallel to the southern boundary of said lot, as testified to by the witnesses, and used the same for the reception and delivery of freight in such manner as to interfere with or prevent reasonable access to and egress from the said lot from D street, and that such maintenance and use of said track affected injuriously the value of the said lot, so that the plaintiff could not advantageously use, sell, or rent the same; and if the jury are further satisfied that during this entire period the plaintiff was trying to sell the lot or make some use of it and could not do so because of said track, then the plaintiff is entitled to recover in this suit such damages as will reasonably compensate her for the loss or injury so resulting from the maintenance and use of the said track from 24th April, 1873, to 24th April, 1876.

2. The jury are instructed that if they shall find that the property in question was rendered unsaleable by reason of the alleged nuisance, and, further, that the plaintiff in good faith was trying to sell it, an allowable method for them to estimate the measure of damages is to ascertain what the plaintiff might have obtained for the property with the obstruction there and what she might have obtained for it with the obstruction removed, and allow her the legal rate of interest—that is, six per cent.—on the difference for so long a period, not exceeding three years, as the jury shall be satisfied that she was so continuing her efforts to sell it.

3. If you shall find for the plaintiff, then having ascertained a sum you think would on the 24th day of April, 1876, have compensated the plaintiff, you are allowed in your discretion to add interest, not exceeding six per centum, upon that sum from that date, provided you shall think that such sum without interest is not a fair compensation for all the loss you find that the plaintiff has sustained.

4. If the jury shall find that plaintiff was damaged by reason of a sale being prevented, they will, in ascertaining the extent of said damage, exclude from consideration as a subject of sale the space devoted to alley purposes.

5. If the jury shall find that the defendant so obstructed the access to and egress from the plaintiff's land that she could not use the same as such property is generally used, then the jury are at liberty to allow such damages as they shall find have resulted from the act of the defendant, irrespective of any attempt made by the plaintiff to sell the same.

6. The court erred in instructing the jury that the plaintiff could not recover anything more than nominal damages, and that they should find for the plaintiff for one cent damages.

Points of Law.

I.

The plaintiff owned all of lot one, the fee in the alleys included.

The partition deed (Rec. 7) read in connection with the plan of subdivision (which formed a part of the deed) shows that Mrs. Hetzel took lots 1–5 with the fee of the alley adjacent to said lots, and that Judge Wylie took lots 6–11, with the fee of the alley adjacent to those lots. Each retained the easement of a right of way over the alley space of the other, and each had the right to have the alley kept open, except as limited by the terms of the deed as to certain specified lots.

These alleys and area were not dedicated to the public; they were declared to be "exclusively for the sole benefit and use of said lots." *Sec. 480. Rev. St., D. C.*

By the terms of the deed, Wylie, his heirs and assigns, could at any time close the ten-foot alley running northward in the rear of lots 8 and 9. This proves that the fee in that alley was in Wylie, as attached to the lots bordering upon it; or, rather that Mrs. Hetzel, in conveying lots 8, 9 and 11 to Wylie, conveyed under that description her interest in fee in the alley space. The soil of the alley passed as parcel adjoining the lots.

In like manner the deed of partition gives the owner or owners of lots 4 and 5 the privilege of closing the five-foot alley along the rear of lot 5 and part of lot 6.

Then follows this significant language (Rec. 7):

"All these alleys and area shall be private, and to be under the control of all owners of property touching thereon, and except as hereinbefore otherwise provided shall never be closed unless by *common consent.*"

Surely this does not mean that the fee in the area and alleys is to remain in Hetzel and Wylie, and descend to their heirs; and that at some future day the owners of the lots, by joining together, shall have a right to go into equity and compel a conveyance upon paying the parties holding the H. and W. interest for the value of the fee.

The only reasonable interpretation of the provision results in this—that Mrs. Hetzel, upon becoming owner of *all* these lots, took the whole fee in the area and alleys, as of land adjacent to the lots. The fee passed as parcel of each lot, just as land to the centre of a highway passes when conveyance is made of the lot adjoining the highway and described as bounded by it. 3 *Washburn's Real Property*, (4th ed.) 396.

As between grantor and grantee the conveyance of a lot bounded on a street in a city carries the land to the center of the street, and this although the deed contains no reference to the street, but the lot is described by numbers as represented upon a map whereon it appears as abutting on the street, and the bounds as given do not include any part of the street. *Hennessy v. Murdock*, 137 N. Y., 317.

> "It is not reasonable to infer that the grantor intended to reserve the title to the fee of the narrow strip lying between the physical boundaries of the lot conveyed and the centre of the street, or that the grantee understood that any such reservation had been made. The use of the fee of the bed of the street is so inseparably connected with the ordinary use of the adjacent lot that a severance of the two will not be deemed to have been effected unless the presumption that the grantor intended to pass title to the centre of the street is rebutted by other parts of the deed and by the condition and relation of the parties to the lands conveyed and other lands in the vicinity." Per MAYNARD, J.

Adjoining parcels of land necessary to the use of a canal and water power, and used with it at the time, were held by the Supreme Court of the United States to pass by a conveyance of a division or branch of a canal, though the conveyance did not in any of its terms include such parcels. *Sheets v. Selden's Lessee*, 2 Wall., 177.

> "The objection that the deed does not cover the premises in controversy rests upon the fact that it does not convey the parcels of land for which the action is brought by specific designation and description. Such designation and description, though usual, are not always essential. Land will often pass by other terms. The true rule on the subject is this, that everything essential to the beneficial use and enjoyment of the property designated is, in the absence of language indicating a different intention on the part of the grantor, to be considered as passing by the conveyance." Per FIELD, J., page 187.

The Court held that these portions passed not as appurtenances, but as "part and parcel" of the land intended to be conveyed; and that the intention to convey them was founded upon the fact that they were necessary to the beneficial use and enjoyment of the surplus water. In a word, the Court looked beyond the mere descriptive terms of the conveyance to ascertain what the parties had really intended should pass.

See *In re Robbins*, 34 Minn., 99; and *Taylor v. Armstrong*, 24 Ark., 102.

In Connecticut the Court holds, where land is conveyed bounded upon a highway, that it must appear in clear and explicit terms that the grantor intended to exclude the highway, otherwise the fee in the highway passes. *Champlin v. Pendleton*, 13 Conn., 23.

So, in Georgia, where the owner of a tract of land divided it into lots, opened an alley through it, and sold lots on the alley, but did not in her deeds to the purchaser expressly reserve the right to have the alley revert to her when it ceased to be used as an alley, it is held that upon the use ceasing the alley attaches to the abutting lot although it had been open for seven years, and the public or any one who desired to use it had been permitted to do so. *Cincinnati R. R. v. Mims*, 71 Ga., 240.

These adjudications, so far as we have been able to discover, stand uncontradicted. The principle upon which these and similar decisions rest being that the intention of the parties to the conveyance shall govern, it sometimes happens that the

presumption of a grantee taking the fee so far as the centre of the highway gives place to a construction that ownership in him extends even to the whole of the soil of the highway. Such is the result of a well considered case recently decided (1885) in Rhode Island.

A highway was laid out wholly on the land of M., the north line of the highway coinciding with the north line of M.'s land. M. afterward sold the land south of the highway, in his deed bounding the land "on the highway." Subsequently the highway was declared useless and discontinued. *Held* that the grantee was entitled to the *whole* of the land of the former highway. *Healey v. Babbitt*, 14 R. I., 538.

That the parties to the conveyances which made Mrs. Hetzel the owner of all the lots in the sub-division, together with the lot at the northeast corner,—intended that she should be vested with the ownership in fee of all of original lot one cannot be seriously questioned.

The lots in the sub-division are not described by metes and bounds, but by numbers; and the deeds refer to the plan for identifying the nature and extent of the land conveyed. In the cases just cited, however, there had been a dedication of the highway to the public and the description in the deed was by measurement, beginning at a point on the line of the highway. Moreover, the highway itself had an actual existence, and was not as here a mere design upon paper.

The case of *Harris v. Elliott*, 10 Peters, 25, sometimes cited to the point that the soil in a highway does not pass under the term "appurtenances," is in harmony with our position, and with the principle applied in *Sheets v. Selden's Lessee*. The Court were passing upon the inquest of a jury that had appraised land taken for the use of the United States. They expressly sanction the doctrine that in ascertaining the effect of a conveyance the intention shall govern:

> "The streets were clearly not appraised, and so did not pass to the United States unless they passed as an incident, under the term appurtenances. If, from the use of this term, connected with and explained by the other

parts of the inquest, it clearly appeared to have been the intention of the jury to include the streets, it might be considered a part of and explanatory of the description, and be carrying into effect the intention of the jury. But if no such conclusion can be drawn, the term must receive its legal and appropriate interpretation." Per THOMPSON, J., page 53.

We insist, then, that it is clear that in dealing with this property the parties intended that the sole owner of all the lots touching upon the alleys should have the right to close the alleys, and that this right was based upon the fact that such sole owner had thus become the holder of the fee of all the alley space which, as being attached to the lots, had passed as parcel thereto.

The learned judge below, therefore, fell into error when he instructed the jury that the plaintiff was not damaged by a failure to sell lot number one, basing his reason for such instruction upon the assumption that plaintiff was unable to consummate a sale, for lack of title in fee to the alleys.

II.

Let us, however, admit for argument's sake, that as to the alleys the plaintiff was seized in fee jointly with Judge Wylie. The result is merely that upon plea in abatement for non-joinder plaintiff might have been compelled to amend her declaration. It can not be made ground of non-suit. 1 *Chitt. Pl.*, 66. The fact of an outstanding interest in Judge Wylie might have been used to apportion damages, but it is no ground for denying plaintiff's right to recover substantial damages.

III.

This is a suit not for damages for a failure to sell lot one, but for damages for maintaining a nuisance, obstructing the highway and preventing the plaintiff from making use of her land. An element of damage to be sure, is that during the entire period of three years the plaintiff was prevented by the rail-

road company from selling her land. She was virtually deprived of her property for that time.

The declaration does not set forth that the plaintiff could not sell lot one. The allegation is that the defendants "diminished the value of said *land*, and prevented the plaintiff from selling the same." It was the saleable land, be it more or less, contained in her lot that plaintiff could not dispose of. The proof was that she had offered for sale not "lot one," but her *land* at D and North Capitol streets. The testimony to the effect that various agents were directed to sell the lot as a whole meant that they had the authority to sell it with the subdivisions as they existed, together with all of plaintiff's rights thereto belonging.

Subdividing the original lot one had not destroyed the existence of such a lot, for the ordinary purposes of selling the entire tract. Lot one existed after the proper subdivisions had been created, just as truly as before. If anybody owned lot one, the plaintiff was that owner. Real estate agents and buyers understood perfectly well what it meant to buy or to sell lot one. The plaintiff proved that the defendant had prevented her from selling her land.

IV.

The averment is that the plaintiff owned in fee a lot of land at the corner of D and North Capitol streets; and that defendant obstructed a public street on which the lot abutted, and unlawfully destroyed access to the land. After alleging, by way of inducement, a seizin in a certain lot of land, describing and identifying it as situated at the corner of two streets (naming them), the declaration, in order to show the extent of the injury, sets forth the dimensions of the lot, by adding the words "being lot numbered one in square six hundred and thirty, in said city."

These additional words are an allegation of a matter of substance, viz., that plaintiff's lot of land ran 160 feet on D street (and so on for the rest of the dimensions), and contained a certain number of thousand of square feet. They are employed

not as descriptive of the identity of the lot,—that had already been accomplished sufficiently to apprise the defendant, by stating the location;—but for the purpose of introducing a substantial averment affecting the damages—to set out the shape of the lot, or in other words, the quantity of land injured.

Says Mr. Greenleaf: "In general the allegations of time, place, quantity, quality and value, when not descriptive of the identity of the subject of the action, will be found immaterial, and need not be proved strictly as alleged." *Evidence*, vol. i, sect. 61. By turning to sect. 56 we see that in using the words "descriptive of the identity," Mr. Greenleaf means allegations of time, etc., that are *essential* to the identity of the subject-matter; words that are essentially descriptive. With this qualification in view, we see the force of the author's note to sect. 56. "Perhaps," he says, "the distinction taken by Lord Ellenborough in *Purcell v. McNamara*, and recognized in *Stoddart v. Palmer* (3 B. & C. 4), will, on closer examination, result merely in this, that matters of description are matters of substance when they go to the identity of anything material to the action. Thus the rule will stand, as originally stated, that the substance, and this alone, must be proved."

The decision in *Purcell v. McNamara* is, that in an action for malicious prosecution, where the declaration stated that the defendant indicted plaintiff for perjury, etc., and plaintiff was acquitted, it is not material for plaintiff to prove the exact day of his acquittal as laid in the declaration; a variance between the day laid and the day stated in the record produced to prove the acquittal is not material, so that it appears that an acquittal was had before the action brought.

> LORD ELLENBOROUGH. There are two sorts of allegation: the one of substance, which must be substantially proved; the other of description, which must be literally proved. This allegation is that plaintiff was prosecuted "until afterwards, to wit, on the morrow of the Holy Trinity in the 46th year," &c. she was acquitted. The substance of the allegation is no more than that the plaintiff was acquitted upon that prosecution.....

> There would be a repugnance between the allegation and the proof if it were to be considered as a specific allegation of time; but if it be only taken as a substantial allegation of the fact of the acquittal or of a time which is shown to have been before the action brought, then the repugnance is immaterial..... This is an allegation of substance and not of description.

See note to *Bristow v. Wright*, 1 Smith Leading Cases (8th Am. Ed.), 1431, upon a certain class of allegations which have been always held to be distributive and divisible, so that it is not necessary to prove them in their full extent. A distinction exists between claiming too large a right, and claiming the right in respect of or as applicable to more than the proof warrants. In the first case the right itself cannot be divided; in the other it is not the right itself which is affected by the proof, but only the subjects in respect of which it is claimed, or to which its exercise is sought to be applied.

Action for disturbance of common, plaintiff declared possession of a certain messuage and one hundred fifty acres of land, and by reason thereof entitled to have common of pasture, etc. Proof was that he did not have right of common in respect to a messuage and land, but in respect to other land in the same parish of which he was possessed, which land had no messuage upon it.

> ABBOTT, C. J. "The difficulty in this case is to ascertain whether these words are matter of description, or not. The words are: The plaintiff was possessed of a messuage and 150 acres of land with appurtenances, and by reason thereof was entitled to common of pasture for sheep levant and couchant on the said messuage, etc., at all times of the year, upon on a certain common called Wheat Common. But there are not the words 'thereto belonging,' or any others of the like import, so as to connect the messuage and the land together. Had there been such words of connection I should have thought the plaintiff was not entitled to recover. But this is not the case; and the messuage and lands are not connected together as one entire tenement. I think, therefore, that these are not words of description; but that this allegation is divisible,

> and that it may be considered as stating that the plaintiff was possessed of a lease and also that he was possessed of land, that in respect of both or either he was entitled to the right of common. Plaintiff who has proved an injury done to the right claimed in respect of land is entitled to a verdict." *Ricketts v. Salwey*, 2 B. & Ald., 360.

In *Gregory v. Hall* (Cro. Eliz., 531), it was held that a right claimed in respect of a messuage and twenty acres was well supported by evidence of a right in respect of a messuage and eighteen acres only.

So, in case for obstruction to a private right of way, plaintiff declared lawful possession and occupancy of a messuage and two acres, and proof was of occupation of a moiety only of the cottage in respect of which the right of way was claimed. *Held*, sufficient. *Bertie v. Beaumont*, 16 East., 33.

Notwithstanding the strictness of the early English cases, we find as far back as *Yarly v. Turnock* (Palmer, 249), that a plaintiff who alleged seizin of 60 acres pasture, 60 meadow and 80 arable land, and entitled in respect to them to a right of common, could recover, upon proof of a less quantity of land. The jury found a right of common in respect of 90 acres of arable, meadow and pasture. In sustaining the action DODDRIDGE, J., says: "Here the demand is of damages for a tort done to his common, and if it be found in any part, he has damages accordingly."

We have said that the addition of the words "being lot one in square 630," was an allegation of the dimensions of the land; that the location had already been set out.

Suppose, however, we had declared, that "whereas plaintiff was seized of lot one, etc.," leaving this as the only means of notifying the defendant of the *locus in quo*. Even then, according to the approved authorities, we need not have proved title to the whole of the lot.

The defendents' plea did not put our title in issue. *Richardson v. City of Boston*, 19 How., 263.

It is enough to have proved injury to a part of the lot.

Tyson v. Shuey, 5 Md., 551: "When the *nar* describes the land by abuttals, or metes and bounds, it is necessary these should be proved as laid, because they afford the only means by which the defendant is notified of the place in which he is charged with committing the injury. But although such proof is required, the plaintiff is not bound to prove either his title or possession to the whole of the close. A right to such part as includes the trespass is sufficient, 1 *Greenl. Ev.*, sec. 62, *Bull. N. P.*, 89; *Tapley v. Wainright*, 5 B. & Ald., 395. If, instead of abuttals, the name is given, that is notice to the defendant of the close for the trespass on part of which the suit is brought. And if the plaintiff can prove his possession of such part of the close named, as has been trespassed upon he will succeed, without being obliged to show the exact limits of the entire close, or to establish his right to the whole of it. 8 M. & W., 381; 2 B. & Ad., 99; 9 Dow. & Ry., 495."

In *Tapley v. Wainright*, just cited, Lord DENMAN says *arguendo:*

> "On the general issue the plaintiff, though he may have meant to insist on the tresspasses over the whole of a piece of ground, described by name or abuttals, and though he gave evidence of trespasses upon the whole, will be entitled to recover *pro tanto*, though the jury should find that some only were proved." 5 B. & Ald., 399.

On a plea of *liberum tenementum* to an action of trespass to a close named in the declaration, the defendant is entitled to a verdict, if he establish a title to *that part* of the close on which the trespass was committed, and is not bound to prove a title in the whole close. Baron ALDERSON says:

> "There seems to us to be no distinction in the cases where the declaration describes the close in which, etc., by metes and bounds, or by name only. In both cases, it must be taken to mean a complaint that the defendant committed a trespass upon a piece of land in the lawful possession of the plaintiff, described in the one case as being part of a close having certain metes and bounds, and in the other case as part of a close named A. The

metes and bounds in the one case, and the name in the other, serve only to define what close it is for the trespassing on a part of which the plaintiff brings his suit. When, therefore the defendant, following the declaration, asserts in his plea that the close in which, etc., is his soil and freehold, we think his plea means that the part of the close so described in the declaration on which he admits that he has done the acts complained of, was his soil and freehold." *Smith v. Royston*, 8 M. & W., 386.

Upon the theory of the court below, therefore, the fourth instruction prayed for should have been given, and the jury allowed to determine the extent of damages inflicted.

V.

In view of the many years that this litigation has been protracted we ask the Court to announce the correct rule of damages to be applied at the next trial. At the trial below, as on two former occasions when before a jury, we established the fact that the defendant had wrongfully deprived the plaintiff for three years of the use of her land. She could do nothing with it—neither sell nor lease it, nor apply it to any purpose whatever.

The opinion of the General Term in *Hetzel v. R. R.*, 6 Mackey, 1, betrays an entire misconception of the nature of this action, and of the measure of the compensation which a plaintiff suing for such injury is entitled to recover. The Court there treat the wrong as if it had resulted in the defeat of some one particular attempt to sell; as if the property holder had no right to complain except for a failure of a plan of operations which she had entered upon, with details of time and price, to dispose of her land in a specified way. Besides, the doctrine of the measure of damages there announced is based upon the assumption that it is the duty of a plaintiff whose rights are thus invaded by a wrong doer to sell land outright at a ruinous sacrifice. We submit that the theory of this opinion has no foundation in law.

The correct rule is that which Judge HAGNER followed at

the first trial, when the case was carefully presented by both parties, and the law clearly explained to the jury. The following is an extract from Judge HAGNER's charge:

> "In estimating the damages the jury is at liberty to take into consideration what they shall find from the evidence was the fair value of the property during the time specified in the declaration in the absence of the D street track as a mode of ascertaining the loss sustained by the plaintiff from the lot remaining unproductive during the said period if they shall find such unproductive condition resulted from the said act of the defendant in maintaining and using the said railway track on D street.
>
> "And they may allow such sum as would amount to six per cent. interest on what they may find was such fair value of the lot for the said three years, if they shall believe that the loss of revenue was caused wholly by the said D street track; or a lesser sum, proportionate to the effect they may believe the maintenance and use of the said track had in causing the lot to lie unproductive."

Upon appeal the opinion of the General Term was delivered 12 January, 1885, by Mr. Justice JAMES, reversing the judgment below because of error in the rule of damages. The testimony (as the record shows) was the same at that trial as in succeeding trials. What the court said upon the question of damages was as follows:

JAMES J. "It was not proven that this property could not be used by the plaintiff in the way that she was using it before, for she was not using it at all. It was a vacant lot. There was no evidence to show that it was about to be rented, and could not be rented. But the evidence bore wholly upon the saleableness of the property; and there we are of opinion that the court adopted a principle and a method of getting at it which is untenable, and for this reason we shall have to send the case back. * * * *

There was no proof of her being defeated in the capacity to occupy it and carry on business on it; no proof that she tried to. But the proof did relate wholly to the loss she must be regarded as having sustained in not being able to get a purchase price for it. She was not to be allowed the whole price as having been lost to her, but the usufruct of that

price which she would have had if she had sold it. Evidence was offered to show the value of the property, with an attempt to show the value of the property with this obstruction there, and what it would have been if the obstruction of these trains had been taken away and removed; what the property might have brought if it had not been injured at all.

We find that the court allowed the jury to take the entire value of the lot as the basis, and give legal interest, six per cent. on that during the period of the obstruction, for three years nearly. Assuming that as the method of getting at it, the true method would be to ascertain what she might have gotten with the obstruction there and allow her six per cent. interest on that which the obstruction kept her out of, which is the difference between what she might have got with it there, and what she might have gotten without it. That is what the railroad kept her out of.

Suppose, for instance, the property would have sold for $4,000 just as it lay with this obstruction there, and would have sold for $8,000 without it. What she is kept out of would have been that additional price, and consequently the interest on that price for the three years that she was prevented from getting it. She was stopped from selling, we would say, three years.

But this instruction to the jury allowed them to take the whole value of the lot, to get at the value of the lot and take that and allow six per cent. interest. There was no proof at all tending to show that she could not sell it for anything. We are not told really what her effort was. There is testimony that she tried to sell it, but neither she nor her agents told us what they asked for it. She did not afford the means of ascertaining at all what it was, what difference of price it was they were kept out of the use of during the three years by this obstruction. The basis was not given for a proper calculation, and the court went too far in allowing six per cent. on the entire price. It is impossible that the property should have been annihilated and been worth nothing, and the measure is that proportion of the price that this obstruction prevented her from getting by sale, or rather the usufruct of that. That cannot be sustained as a basis of damages.

It is with some reluctance, considering the history of this case, that we order a new trial. But we have felt constrained to do so because the damages are not based on the right foundation.

Upon a new trial the defendant company themselves, relying on the language of Judge JAMES, asked for the instruction as to damages, which was granted. Its language will be found on page 3 of the reported case in 6 Mackey. The case then went up again on appeal with the result that the Court reversed the judgment below, for error in granting the instruction referred to.

We are content to place these two opinions of the learned judge side by side.

We seek permission, however, to add, by way of contrast, the following lucid and forcible expression of views on the question of damages, fr ı a distinguished lawyer, himself at one time an occupant ‹ he bench. We refer to that honored leader of the bar ‹ Western New York, the late Henry R. Selden, eminent for his services as a member of the Court of Appeals of the State of New York. A recent writer, who is in all respects qualified to speak of Judge Selden, has said of him in a sketch of that court, recently published: "He is known in this State as a lawyer of uncommon ability, and his opinions, in volumes 21–25, are a confirmation of his reputation." *Irving Browne*, in *The Green Bag*, July, 1890, page 283.

The plaintiff had the counsel and aid of Judge Selden in her first suit. He argued the case before the referee, and afterwards before the General Term,—not this suit we mean, but the suit for damages prior to 1873. Writing under date of 17th September, 1874, upon the question of the measure of damages, Judge Selden says,—and the italics are his:

* * The property, if it had been unobstructed by the railroad would have been very valuable to build upon, and by such building to produce income, and consequently it was valuable to sell for that purpose. The obstruction by the railroad has, from the time when it commenced, rendered the property utterly valueless to build upon, and will keep it in that condition so long as the obstruction continues, if it should be fifty years—and so long the property will be entirely unsaleable for that reason.

Now to assume that Mrs. Hetzel sustains no damage by having a valuable property rendered by an obstruction utterly

useless and unsaleable for a series of years because in its present actual condition it would not produce income would be, I respectfully suggest, a very great mistake. The damages consist not in the loss of the income of the property in its present condition, which would be little more than 0, but in being deprived, by the obstruction, of the power to make the property intrinsically valuable, productive of an income commensurate with its value.

If the obstructions were away, Mrs. Hetzel by a moderate outlay in the improvement of the property could have made it produce a handsome income not only upon the outlay *but upon the value of the property besides.* Of this power she has been deprived by the interference of the R. R. Co., and this deprivation will continue as long as the interference continues.

Suppose the Co. should hold the matter in its present condition for 50 years? Could it be said that Mrs. H. had sustained but nominal damages because in its present condition the property would produce but nominal income? As well might it be said if a farmer were deprived of the use of his farm he could recover but nominal damages, because without capital invested in its management, without seed sown, and labor bestowed upon it, it would produce but a nominal income. What the farmer loses in such case, is not what the farm untouched would produce, but what, by the addition of his capital, labor and skill, it could be made to produce beyond compensation for such capital, labor and skill. What he has been deprived of is, not what the farm would produce spontaneously, but of the *power to make it productive.* That is what Mrs. Hetzel has been deprived of, and will be, as long as the obstruction continues.

The property, although intrinsically valuable, she can neither use nor sell. The company have no right to say, Mrs H. would not, or could not, for want of means, or otherwise, have improved the property. I say, and have a right to say, she could have found the means if she had them not. The acts of the company have deprived her of this power. She could have sold the property to others who had the means. The company has deprived her of this power.

She has, therefore, lost at least *the interest of the money the lot could have been sold for if the obstructions by the Company had not been in the way.* If she could have shown, that by improving the property she could have made it produce a larger income than the interest, *she would have been entitled to the amount of such larger income;* but less than the interest

of what the land would have sold for, cannot by possibility be a compensation, because with the railroad away she could have sold and obtained that income, and with it there she could not sell at all.

You will probably recollect that when I stated before the referee that the least damages which Mrs. Hetzel could be entitled to was the interest on what the land would have sold for if the interference of the railroad had not existed, Mr. Cox said he regarded that as the true measure of damages, if Mrs. Hetzel was entitled to damages. In consequence of this declaration, I dropped the subject at that point, and really made no argument on the question of damages.

For the reasons which I have given, I think the question whether the land in its present condition would have been productive or not, if the railroad had not interfered, *has no bearing whatever upon the case.* What Mrs. Hetzel has suffered by that interference is *the power to make her property productive* either by use or sale. Of *this power* she has been deprived, and her damages cannot be less than the interest of the money her lot would have sold for if the railroad company had not, by its obstructions, deprived her of the power of sale.

Surely this is sound reasoning. The defendant wrongfully prevented the owner from converting her land into money. Had it not been for the tortious acts of the railroad company, kept up year after year, the plaintiff could have sold her lot in April, 1873, at a substantial price, viz: the market value of a desirable building lot in that part of the city possessing all the advantages that other lots have of free access.

We have not come across a single reported case where the act of a wrongdoer has virtually taken a city lot out of the market and destroyed for the time being its saleable value. Nowhere else in the United States, it is safe to say, would it have been tolerated, that a railroad company should, without leave or license, appropriate to itself a public street for its freight yard, and stay there entrenched for several years.

Some slight analogy as to the rule of damages, however, is afforded by decisions upon breaches of covenant, where one has entered upon a course of conduct that ensures profit, and is deprived by another of the chance of earning that profit.

In earlier cases courts appear to have entertained an idea that profits are to be excluded in every event, as being a remote result, or as depending upon future acts or contingencies. But this idea has of late years given place to a more just conception of the rights of an injured party. It is now settled that profits, such as the contract itself looks to—the "direct and immediate fruits of the contract,"—are a proper element of damage. *Masterson* v. *Mayor of Brooklyn*, 7 Hill, 69; *Phila., Wilm. and Balt. R. R.* v. *Howard*, 13 How., 307. Compare remarks of Mr. Justice BRADLEY, in *U. S.* v. *Behan*, 110 U. S., 344.

It is not enough that the amount of profits is difficult of computation; if the parties had such profits in contemplation, then a loss of profits may measure the extent of the damage suffered by the party whose contract is broken. The plaintiff loses the *value* of his contract, and can recover for that loss.

Two well considered cases in the Court of Appeals of New York, where this rule is discussed and applied, are *Wakeman* v. *Wheeler &c., Manf. Co.* (1886), 101 N. Y., 205, and *Trust Company* v. *O'Brien* (1894), 143 N. Y., 284. They may be briefly stated as follows:

In the former case the parties had entered into a contract by which defendant agreed that if plaintiffs should succeed in selling fifty of the defendant's sewing machines to one firm or party in Mexico, during a trip of their agent about to be made, they should have for every fifty machines so sold the sole agency for the sale of machines in that locality; and defendant agreed to furnish the machines. Plaintiffs' agent made two sales of fifty machines each, to persons in different localities in Mexico. The defendants filled one order and refused to fill the other. It refused to fill further orders from plaintiffs, or their agent, and repudiated the contract.

In an action for breach of contract *Held*—

Plaintiffs were not confined to the damages sustained by reason of defendant's refusal to fill the orders actually given; they were entitled to recover such damages as they could show they had sustained by a total breach of the contract, *i. e.*

the value of the contract, not merely imaginary or speculative damages, but such as were reasonably certain, and such only as actually followed or might follow from such breach, such as a jury could determine approximately upon reasonable conjectures and probable estimates.

The court below had held that as matter of law plaintiffs could recover damages only for refusal of defendant to fill the orders actually given; and that any further allowance of damages would be merely speculative and imaginary.

EARL, J. "When it is certain that damages have been caused by a breach of contract, and the only uncertainty is as to their amount, there can rarely be good reason for refusing on account of such uncertainty, any damages whatever for the breach. A person violating his contract should not be permitted entirely to escape liability because the amount of the damages which he has caused is uncertain. It is not true that loss of profits cannot be allowed as damages for a breach of contract. Losses sustained and gains prevented are proper elements of damage. . . . When a contract is repudiated, the compensation of the party complaining of its repudiation should be the value of the contract. He has been deprived of his contract, and he should have in lieu thereof its value, to be ascertained by the application of rules of law which have been laid down for the guidance of courts and jurors."

The judgment below was very properly reversed.

In *Trust Company* v. *O'Brien*, the Court applied the rule to a case of breach of covenant by a lessee. It seems that the owner of a building had inserted a provision in a lease that the lessee should not sub-let, and that he should permit his lessor to show the premises and to put up a sign "To Let." The lessee did sub-let, and the sub-tenant refused to let the owner put up a "To Let" sign, or show the premises.

The term of three years expired in May, and the building remained unoccupied till February of the following year.

The trial court held that the failure to rent could not upon the evidence be regarded as the natural or necessary consequence of the breach, and directed a verdict for nominal damages.

The Court of Appeals in reversing the judgment said that the question whether such damages resulted from the breach of the covenant was a question for the jury.

"The proof may sometimes be rather difficult upon the question whether the damage was the just or proximate result of the breach of the covenant. In such case it does not come with very good grace from the defendant to insist on the most specific and certain proof as to the cause and amount of the damage when he has himself been guilty of a most inexcusable violation of the covenants which were inserted for the very purpose of preventing the result that has come about. *Wakeman* v. *Wheeler, etc., Co.*, 101 N. Y., 205. Reasonable certainty is sufficient." *Per* PECKHAM, J. Page 289.

And the Court well remarks:

"Certainty to reasonable intent is necessary, and the meaning of that language is that the loss or damage must be so far removed from speculation or doubt as to create in the minds of intelligent and reasonable men the belief that it was most likely to follow from the breach of the contract and was a probable and direct result thereof. Such a result would be regarded as having been within the contemplation of the parties and as being the natural accompaniment and the proximate result of the violation of the contract."—*Ib.*

That plaintiff with the obstruction out of the way could readily have sold her lot is reasonably certain. A like certainty would have attended her efforts as attended the making of the profits mentioned in these two New York decisions. It follows that the defendant should respond in damages for having prevented the plaintiff from making that productive use of her land which she was trying to make.

The Court in General Term, and its successor (the Court of Appeals), we understand, have never denied this proposition. They do, however, enunciate a rule for measuring the damage that renders the remedy wholly inadequate, and fails to give the redress to which the plaintiff is justly entitled.

That rule is, as expressed by Judge JAMES, a sum equivalent to interest on the difference between what plaintiff "might

have got for her land with the obstruction there and what she might have gotten without it." (*Ante*, p. 16.)

This method of arriving at the measure of plaintiff's loss we believe to be unsound. The correct rule, as we have already said, is embodied in Judge HAGNER's instruction (*Ante*, p. 15). It contemplates interest on the fair value of the lot, in the absence of the obstruction.

The lot contained about 32,000 square feet. At 75 cents per square foot (a fair price without the obstruction), it would bring, let us say, $24,000. Let us suppose it would have brought 40 cents, with the track there, or $12,800. According to Judge JAMES we can recover six per cent. on $11,200. We say we are entitled to six per cent. on $24,000.

The rule announced by Judge JAMES might well apply if the suit had been for a loss of rental value; its principle is adopted likewise where the plaintiff has actually sold his land, and sues the wrongdoer outright for the difference between what he has got and what the sale would have brought him but for an obstruction.

But in the case at bar such a rule has no place. Mrs. Hetzel could not in theory of law be required to part with her land at a sacrifice. Judge JAMES virtually says "The plaintiff *should have sold her land* for what it might have brought. If she has not chosen to do this, she cannot complain except to the extent of interest on the difference between what she might have got and what it was worth if defendant had not interfered." This is unfair, particularly in a case of tort.

The defendant prevented the plaintiff from enjoying the opportunity (and it was "reasonably certain") of selling her land for (let us say) $24,000. What she lost is represented by the interest on that sum.

The true test is—Does an obligation rest on the plaintiff to part with his property at a lower price than it would bring if defendant had committed no trespass. If a house were in question, the plaintiff is obliged to try to rent it at a lower rate, for the loss is a temporary one, or at least it is dis-

tributed through stated periods. But in an absolute sale of land it is unjust that an owner should be required to let it go at more or less of a sacrifice. If it is not to be expected of him to do this, how can such an act be predicated as the basis of reaching a rule for the measure of damages?

The closer the question is examined, the more clearly it appears that the reasoning of Judge Selden was sound, and Mr. Justice HAGNER'S instructions to the jury (*Ante*, p.15) entirely correct.

VI.

The Court of Appeals (ALVEY, C. J.,) discusses a point as to which, in view of a new trial being granted, we ask this Court to consider and to express an opinion. We refer to what the learned Chief Justice says upon the effect of the subdivision on the right of the plaintiff to claim damages for her entire holding (Rec., 18). Holding to the theory of the subdivision having created separate and distinct lots (notwithstanding the plaintiff owned them all when she brought her suit), Chief Justice ALVEY says: "The lots fronting on North Capitol street, except lot 3 siding on D street, all being open and vacant, it is difficult to perceive in what way the obstruction on D street could affect them" (Rec., 18).

Parties who went there with a view to purchase (Rec., 8), found no such difficulty of perceiving "in what way the obstruction on D street could affect" the upper lots. By look- at the plan (Rec., 10), it will be seen that the alley is hermetically sealed on D street. A householder does not care to depend upon an alley that you can neither get in nor out of.

But, aside from this oversight of the learned Chief Justice, we contend that the following language of the opinion discloses a perverted view of the facts and of the law of this case:

"Lots 1, 2 and 3, may have been affected; but a party who owns and has a particular parcel of land affected by the existence of a contiguous nuisance, cannot purchase other parcels of land not so affected in contemplation of law, and by adding the parcels together increase the amount of

of damages recoverable: at least not under the conditions existing in this case. The subdivision of the original lot made separate and distinct parcels or lots, and those allotted to Judge Wylie did not abut on D street, and the access to and the exit from them were not affected by the obstruction on that street. The plaintiff in respect to these lots is not entitled to stand in a more favorable position than Judge Wylie could occupy if he had not sold the lots, and it is clear if Judge Wylie were still owner of the separate lots assigned to him in the partition, all fronting on North Capitol street, he would have no cause of action in respect to such lots, for the obstruction in D street such as that sued for in this case." (*Rec.* 18.)

This is to say that the subdivisions on paper constituted a bar to Mrs. Hetzel, even though she owned the whole ground (leaving out of consideration for the moment the alley spaces), and that she was not to be permitted to have the jury find whether any damage was done to the upper portion of her land, because it did not abut on D street.

No authority is cited for this proposition, nor do we believe that any can be found.

The point, it may be remarked, was under consideration, in 1886, by the Supreme Court of Missouri, in a suit for injunction. A street ran through a square or common to the river. Further up the street, three blocks away from the square, was a glass works. The city were about to sell the common and close so much of the street as passed through it, the effect of which would be to require the owner of the works to go one block further to get to the wharf for sand. He sought to enjoin the city, and the court below sustained his right to do so. The city argued that he had no right to prosecute his suit, because he was not an abutting owner.

The Court affirmed the judgment, saying that it was a notorious fact that property in our cities depends for its value much upon its street facilities—the ground upon which local assessments are upheld.

"The contention here is, that relief in such cases is allowed to those only who own property fronting upon the square or

park, or upon that part of the highway which is about to be closed or otherwise obstructed. Such contiguity is always to be considered, and the want of it may often defeat the plaintiff in his action, but it is not the test. The ultimate fact to be determined is, will the plaintiff suffer an injury to his individual rights." Per BLACK, J., *Cummings* v. *St. Louis*, 90 Mo., 265.

Why could not Judge WYLIE have maintained his action against the railroad company if he had continued to own the upper part of the large lot, had tried to sell it, and found that parties who would otherwise buy refused to do so, assigning as a reason that the obstruction of D street rendered his land undesirable?

If Mrs. Hetzel could have sold the entire premises to a syndicate for the purpose of erecting a large building with a court in the centre, and the parties only refused to go ahead and buy because of the railroad's freight obstruction—how can a court say that her recovery must be limited to damages caused by not being able to sell the lots on paper that abut on D street? Unquestionably she had the right to treat her property as *one lot*, a side of which abutted on D street.

The law as we understand it evinces no such tenderness toward a defendant who day after day maintains a nuisance in a public street.

SUMMARY.

To recapitulate:

I. The plaintiff owned the fee of the alleys.

II. Even if it be determined that plaintiff's ownership of the alleys was that of a tenant in common with Judge Wylie, the allegation of her being seized of lot one in square 630 is not descriptive, and the fact need not be strictly proved.

III. The following instruction, as given by Mr. Justice HAGNER is the correct rule of damages:

In estimating the damages the jury is at liberty to take into consideration what they shall find from the evidence was the fair value of the property during the time specified in the

declaration in the absence of the D street track, as a mode of ascertaining the loss sustained by the plaintiff from the lot remaining unproductive during the said period, if they shall find such unproductive condition resulted from the said act of the defendant in maintaining and using the said railroad track on D street.

And they may allow such sum as would amount to six per cent. interest on what they may find was such fair value of the lot for the said three years, if they shall believe the loss of revenue was caused *wholly* by the D street track, or a lesser sum proportionate to the effect they may believe the maintenance and use of the said track had in causing the lot to lie unproductive.

It has been the misfortune of the plaintiff that she has been obliged to carry on this litigation for many years, but now a first opportunity offers itself of having the important questions involved passed upon by this Court. We respectfully submit that for errors of the Court below its judgment should be reversed, and the case remanded with directions to set aside the judgment of the Supreme Court of the District of Columbia, and award a new trial.

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